



Revision of the EU product liability directive

HDI Japan

Marco Visser | Tokyo | 08 Nov. 2023

Agenda

1 Introduction

2 EU Product Liability Directive

3 Final remarks

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Introduction

Product Liability: from negligence to strict liability

Owen "Products Liability" 8th ed. St. Paul 2008, p. 127 ff.

- "Relief for injuries caused by defective products became a serious problem in most developed industrial countries in the second half of the 1950s – from the US to Japan and Western Europe."

Brüggemeier "Tort Law in the European Union" Alphen aan den Rijn 2015, p. 166 recital 274.

- Liability regime for defective products was only on a fault basis (tort of negligence) as a standard in these days.
- California Supreme Court: Escola v. Coca Cola Bottling (1944) and Greenman v. Yuba Power Products (1963)

See further Hay "Law of the United States" 4th ed. Munich 2016, recital 394 ff.; being critical Epstein "Torts" New York 1999, p. 389 ff.

Introduction

Product Liability

1965 Restatement (Second) of Torts § 402A:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Introduction

Product Liability

Major driver towards strict liability regime in Europe:

- Winterbottom v. Wright (1842) establishing producers' liability for negligence

Tobias Lenz in: Lenz "Produkthaftung" 2nd ed. Munich 2022, § 6 recital 158.

- Thalidomide/Contergan catastrophe

Brüggemeier "Tort Law in the European Union" Alphen aan den Rijn 2015, p. 166 recital 275.

→ Strict liability for pharmaceutical products established in Germany since 1978 accompanied by mandatory insurance of 120m EUR per pharmaceutical product

Introduction

A long European way

- Discussion on such a directive started in 1968.
- Directive published in 1985 as a compromise by the Commission and the manufacturing industry.
- Only amended once in 1999: primary agricultural products and game have to be now products (mad cow crisis)

7. 8. 85

Official Journal of the European Communities

No L 210/29

COUNCIL DIRECTIVE

of 25 July 1985

**on the approximation of the laws, regulations and administrative provisions of
the Member States concerning liability for defective products**

(85/374/EEC)

Introduction

Types of legislation in the European Union

Regulations

A "regulation" is a binding legislative act. It must be applied in its entirety across the EU, Art. 288 para. 2 Treaty on the Functioning of the European Union (TFEU).

Directives

A "directive" is a legislative act that sets out a goal that EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals, Art. 288 para. 3 TFEU.

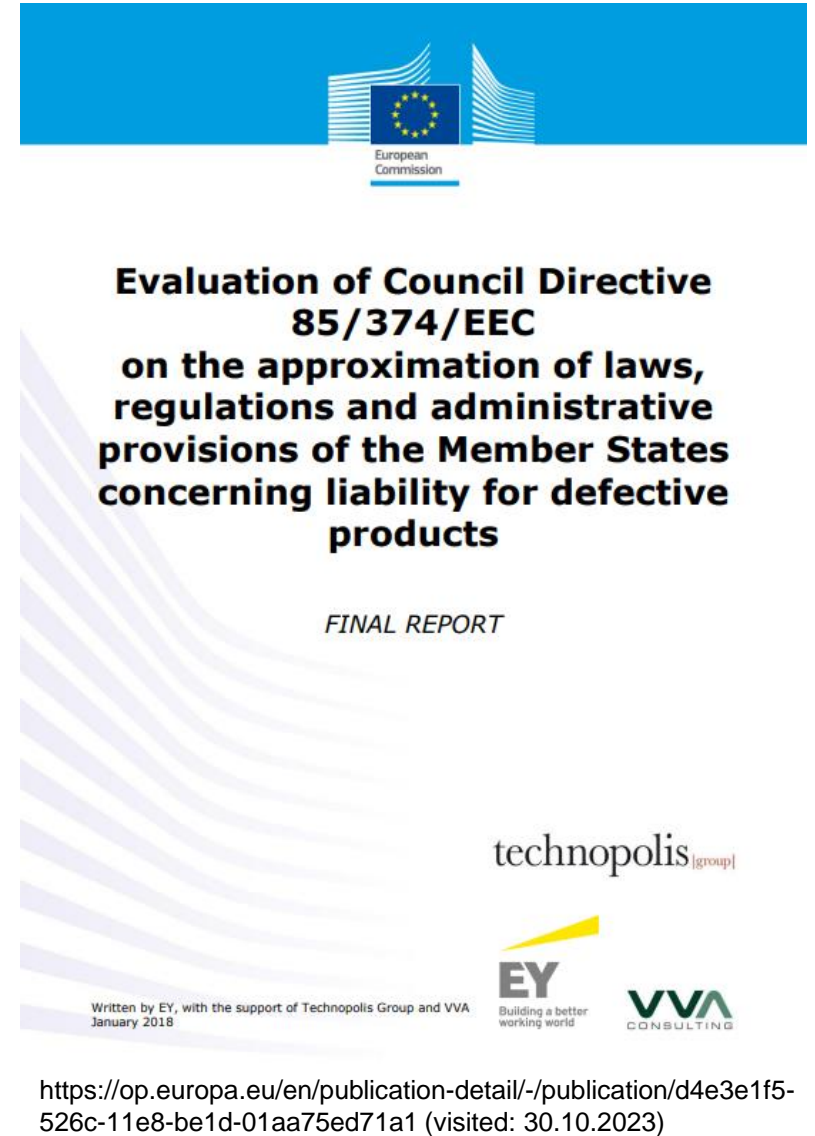
Introduction

Various evaluations of the Product Liability Directive (PLD)

Article 21:

“Every five years the Commission shall present a report to the Council on the application of this Directive and, if necessary, shall submit appropriate proposals to it.”

COM(1995) 617 final, COM(2000) 893 final, COM(2006) 496 final, COM(2011) 547 final, COM(2018) 246 final



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EU Product Liability Directive

EU Product Liability Directive

Various activities

- on IE level
- on national level
- on Commission level (e.g. Product Liability Formation)

START	END	MEETING	ROOM
10:00	17:00	LIABILITY AND NEW TECHNOLOGIES: PRODUCT LIABILITY FORMATION	5.B



Home About ELI News & Events

The Reform of the Product Liability Directive

For an overview of past and upcoming meetings of this project, please click here.
Kindly contact the [ELI Secretariat](#) if you have any questions concerning the project.

Quick Facts

Project Type: Draft legislative proposal
Procedure: Accelerated
Adopted: CD 2022/4
Project Period: March–June 2022

Project Chair

■ Christiane Wendehorst

<https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/pld/>

Advisory Committee

- Urs Buscke (on behalf of The European Consumer Organisation (BEUC))
- Pierre Chalançon (on behalf of Home Appliance Europe (APPLIA))
- Mark Harvey (on behalf of Pan European Organisation of Personal Injury Lawyers (PEOPI))
- Pedro Portellano Díez (on behalf of The Council of Bars and Law Societies of Europe (CCBE))
- Marco Visser (on behalf of Insurance Europe)



29 November 2019 – submitted to the European Commission as part of Insurance Europe’s contribution to the Expert Group on liability and new technologies: product liability formation

Insurance Europe’s comments on mandatory insurance in the context of the Product Liability Directive (PLD) and new technologies

EU Product Liability Directive

- European Commission published its proposal on 28 Sep. 2022.



EU Product Liability Directive

1. Why do EU product liability rules need to be updated?

https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_5791

- The PLD dates back to **1985** and does not cover categories of products emerging from new digital technologies, like smart products and artificial intelligence (AI).
- The current rules are **unclear** about how to determine who would be liable for defective software updates, defective machine learning algorithms or defective digital services that are essential for a product to operate.
- They are **silent** on who is liable when a business substantially modifies a product that is already on the market or when a product has been directly imported from outside the Union by a consumer.
- The revision of the PLD will ensure that the new rules for product liability are adapted to new types of products to the benefit of both businesses and consumers.

EU Product Liability Directive

2. What products will be covered by the revised rules?

- The revised product liability rules **will apply to all products**, from garden chairs to cancer medicines, from agricultural products to advanced machinery but also to software updates. The new PLD makes explicit that injured people can claim compensation if software or AI systems cause damage.
- The new rules also consider products stemming from **circular economy business**, namely business models in which products are modified or upgraded.
- The rules of the PLD would apply to **remanufacturers** and other businesses that substantially modify products in case these products cause damage to a person, unless they show that the defect relates to an unmodified part of the product.

EU Product Liability Directive

3. How do the new rules ensure a better protection for consumers?

- The new rules allow people to claim compensation for harm caused by a defective product, including personal injury, damage to their property or **data loss**.
- One cannot claim compensation if the property that was damaged was solely used for **professional purposes**.
- The new rules also help to put people claiming compensation on an equal footing with manufacturers, by requiring manufacturers to **disclose information** and by **alleviating the burden of proof in complex cases**, e.g. certain cases involving pharmaceuticals or AI.

EU Product Liability Directive

4. Are there limits on the level of compensation that can be claimed under the new rules?

The revision modifies the current rules by removing the existing lower threshold (**500 EUR** threshold for property damage) and upper ceiling (in some Member States **85m EUR**) that has prevented people being fully compensated for the damage they suffer.

EU Product Liability Directive

5. Who is liable for defective products manufactured outside the EU?

- The existing PLD makes **importers** liable for defective products manufactured outside the Union. The new PLD will allow consumers to seek compensation from the **non-EU manufacturer's representative**. This is because it would have been too difficult for consumers to seek compensation from companies outside the Union.
- **Distributors (offline and online sellers)** can also be held liable if they fail to give the name of the EU-based liable person to the injured person on request. This applies to online marketplaces too, but only if they present themselves to the consumer as a distributor.

EU Product Liability Directive

6. What is the relationship between this Directive and the proposed AI liability Directive (COM(2022) 496 final)?

All Member States have **fault-based liability** regimes that require injured people to prove somebody's fault caused the harm they suffered.

If a victim seeks compensation under such national fault-based liability rules (e.g. for harm not covered by the PLD such as infringements of fundamental rights or claims against users of products rather than against the manufacturer) and the claim concerns damage caused by an AI system, the proposed AI Liability Directive could, on certain conditions, **help claimants overcome the difficulties** they might otherwise face because of the opacity of the AI system involved.

EU Product Liability Directive

Next steps, timeline

- EU Commission Proposal is now in the middle of parliamentary procedure.
- Analysis what needs to be changed on the basis of the proposal
- Further lobby activities (e.g. Insurance Europe)
- Once, the Directive comes into force, Member States need to make necessary changes in their national laws in 12 months time.

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Final remarks

Final remarks

- More products (e.g. software) need to be covered.
- No property damage threshold and no liability cap anymore
- Damage definition extended to loss or corruption of data
- Tougher to defend a client due to changes in disclosure of evidence and burden of proof

Final remarks



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[Chat with me on Teams](#)

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Back up

Further topics

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 of the product (CSDDD)

Art. 22:

“Member States shall ensure that companies are liable for damages stemming from the adverse impact that was or should have been identified pursuant to Article 6 and that companies caused or contributed to by failing to comply with the obligations laid down in Articles 7 and 8.”

- How are we effected as HDI Global? How are our clients effected?
- How do we want to insure these (new) liabilities?

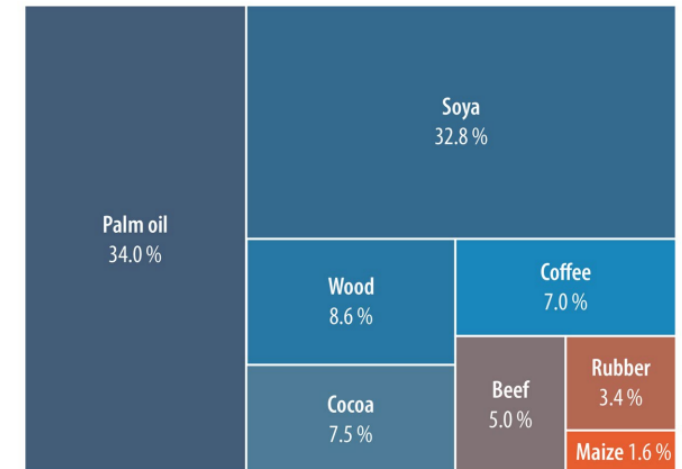
Further topics

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU)

- To fight global climate change and biodiversity loss, Parliament demands companies ensure that products sold in the EU do not come from deforested or degraded land.
- The new law would make it obligatory for companies to verify (so-called “due diligence”) that goods sold in the EU have not been produced on deforested or degraded land anywhere in the world.
- This would guarantee consumers that the products they buy do not contribute to the destruction of forests, including of irreplaceable tropical forests, and hence reduce the EU’s contribution to climate change and biodiversity loss.
- MEPs also want companies to verify that goods are produced in accordance with human rights provisions in international law and respect the rights of indigenous people.

<https://www.europarl.europa.eu/news/en/press-room/20220909IPR40140/climate-change-new-rules-for-companies-to-help-limit-global-deforestation>

Figure 1 – Individual share of EU-embodied deforestation due to selected commodities between 2008 and 2017



Source: EPRS, based on [Commission IA](#), p. 32. Graphic by Samy Chahri.

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698925/EPRS_BRI\(2022\)698925_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698925/EPRS_BRI(2022)698925_EN.pdf)